No. 2661.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Bun Chew,
Appellant,
vs.
Charles T. Connell, as Immigration Inspector in Charge,
Appellee.

BRIEF OF APPELLANT.

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STATEMENT OF THE CASE.

This is an appeal by Bun Chew from an order of the District Court of the United States for the Southern District of California, dismissing a writ of *habeas corpus* and remanding the petitioner-appellant to the custody of the respondent-appellee, Immigration Inspector in Charge at Los Angeles, California. [Tr. p. 67.]

The petition [Tr. pp. 3-53] for the writ alleged that Bun Chew was a Chinese alien in possession of a Chinese Laborer's Certificate of Residence (No. 39,167), he having registered as such Chinese laborer

at Hanford, California, on February 17, 1894 [Tr. p. 36]; that the said inspector had detained petitioner in custody and was about to deport him to China.

The return [Tr. pp. 58-66] of the respondent to the writ of *habeas corpus* alleged that pursuant to the powers vested in him by the United States immigration laws, he had detained the alien, granted him a hearing and on the record thereof the secretary of labor had ordered deportation to China, on the grounds that Bun Chew had "been found within the United States in violation of the Act of Congress, approved February 20, 1907, as amended by the act approved March 26, 1910, in that he entered in violation of section 36 of said act (rule 13) and that he had entered in violation of section 7, Chinese Exclusion Act of September 13, 1888, and rule 1, Chinese Rules." [Tr. p. 63.]

The District Court dismissed the writ by a minute order. [Tr. p. 67.] Therefore, it must be assumed that the court held, contrary to the contentions of the petitioner, that:

1. That the secretary of labor had jurisdiction over the person of the petitioner.

2. That the secretary of labor did not exceed the jurisdiction and authority given him by law.

3. That the petitioner was given a fair trial and hearing by the immigration officers.

The law under which the hearing was had and the deportation ordered is as follows:

Act of February 20, 1907:

> "Sec. 36. That all aliens who shall enter the United States, except at the seaports thereof, or

at such place or places as the secretary of labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by sections twenty and twenty-one of this act; *provided,* that nothing contained in this section shall affect the power conferred by section 32 of this act upon the commissioner-general of immigration to prescribe rules for the entry and inspection of aliens along the border of Canada and Mexico."

(Rule 26 of the above mentioned rules include Douglas, Arizona, as a port of entry.)

"Sec. 21. That in case the secretary of labor shall be satisfied that an alien has been found within the United States in violation of the act, or that an alien is subject to deportation under the provisions of this act, or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came," etc., etc.

Section 7 (in part), Chinese Exclusion Act of September 13, 1888:

"* * * no Chinese laborer shall be permitted to re-enter the United States without producing to the proper officer in charge at the port of such entry the return certificate herein required."

Rule 1, Chinese Rules:

"No Chinese person, other than a Chinese diplomatic or consular officer and attendants, shall be permitted to enter the United States elsewhere than at the ports of" * * * (enumerating ports, which do not include Douglas, Arizona).

Briefly summarizing the various statements in the record it would appear that Bun Chew, who is now fifty-one years of age, came to the United States when he was "very young" [Tr. p 14], having registered at Hanford, California, in 1894 (in compliance with Sec. 6, Act of May 5, 1892, 27 St. at L. 25, as amended by Sec. 1, Act of Nov. 3, 1893, 28 St. at L. 7); that about fifteen years ago he temporarily visited China, re-entering the United States at San Francisco, California [Tr. p. 14]; that early in 1914 he was arrested at Los Angeles, California, charged with being an alien and having entered the United States from Mexico without inspection; that the alien denies ever having left the United States within the last fifteen years and claims that, when apprehended, he was on his return to Visalia, California, from a trip to Phoenix, Arizona.

(For the information of the court it may be well to add that the appellant was released by *habeas corpus* from a previous order of deportation, based on a record identical with the one in the case at bar, except for the certificates appearing on pages 10 and 11 of the transcript. These certificates are intended to identify appellant with the person referred to in the statements of Breton and Garcia, hereinafter discussed. The decision of the lower court in the former case appears in 220 Fed. 387.)

SPECIFICATION OF ERRORS.

The errors, excepted to in the court below, and relied upon by the appellant, are as follows:

1. That the court erred in holding that the Secretary

of Labor of the United States had jurisdiction over the person of the appellant.

2. That the court erred in holding that the Secretary of Labor had jurisdiction or authority to order the deportation of the appellant.

3. That the court erred in holding that the appellant was given a fair trial by the immigration officers before the issuance of said order of deportation.

4. That the court erred in holding that the evidence was sufficient to authorize the deportation of the appellant.

5. That the court erred in holding that the warrant of deportation was not void and invalid.

6. That the court erred in holding that the appellant should be deported, if at all, to China and not to Mexico.

7. That the court erred in holding that there was any evidence before the immigration officers and the Secretary of Labor to legally warrant or support the order of deportation herein issued against the petitioner.

BRIEF OF THE ARGUMENT.

Although the courts will not interfere with the lawful exercise of the discretionary powers granted by statute to the Department of Labor, they will prevent the deportation of an alien, if an abuse of discretion is shown, or if the Secretary of Labor acts in excess of his jurisdiction.

In the case at bar Bun Chew should not be deported for the reasons that:

I. He was not given a fair hearing.

A. There was no evidence before the Secretary of a departure from or a re-entry to the United States.

B. Assuming, but not admitting, that the alien entered, there is no proof that his entry was unlawful.

C. The only elements in the record, that could be construed as evidence of entry, were prepared long before a hearing was granted the alien and consisted only of *ex parte* matter, which, though properly a part of the record, cannot be the only means of proof of a violation of the law.

D. It does not appear from the record that the alien was confronted with and given an opportunity to answer all the statements used against him.

II. From the record it appears that the secretary was without jurisdiction to deport Bun Chew for, if he entered at all, he must have entered the United States more than three years before his deportation was ordered, and more than three years before the petition for his release by *habeas curpus* was filed. Not only must an alien be ordered deported but he must actually be *sent out of the country within three years of the date of his entry.*

Internat. Merc. Co. v. U. S., 192 Fed. 887 (C. C. A.);

U. S. v. Oceanic S. S. Co., 211 Fed. 967 (C. C. A.).

The three-year period being the extent of the Department's jurisdiction, and its forum being one of

limited jurisdiction, the facts conferring jurisdiction must appear on the face of the record.

III. The secretary of labor exceeded his jurisdiction in ordering deportation to China, for, if any foreign residence was shown, the alien's last domicile would be Mexico.

Bun Chew was Not Given a Fair Hearing.

A. THERE WAS NO EVIDENCE BEFORE THE SECRETARY OF LABOR TO AUTHORIZE DEPORTATION.

The necessity for an alien's being granted a fair hearing by the immigration department before his deportation can be ordered by the Secretary of Labor, and the extent of the finality of the Secretary's findings of fact, have been so frequently declared by the courts that citation of authority would be surplusage. We, therefore, merely quote the words of the Circuit Court of Appeals, Eighth Circuit, in Whitfield v. Hanges, 222 Fed. 751, as being a statement of the law as generally recognized:

> "Whether or not the weight of the evidence in substantial conflict at the hearing sustained the charges against the appellees is a question of fact within the exclusive jurisdiction of the officers of the Department of Labor, and the courts in the absence of fraud and mistake are without jurisdiction to review or reverse the finding there.
>
> "But whether or not there was *any substantial evidence* at the hearing in support of these charges and of the finding of the inspector that they were proved, and of his recommendation that the aliens

be deported, under which the appellees were being deprived of their liberty, is a question of law, the power and duty to determine which are vested in the courts and any injurious error in deciding that question by an executive or quasi-judicial officer or tribunal is reviewable and remediable by them."

The burden of proof is on the department, the appellant being a Chinese laborer and being in possession of a genuine Chinese Laborer's Certificate of Residence, which is *prima facie* evidence of his right to remain in the United States. (Sec. 6, Act May 5, 1882, as amended by Sec. 1, Act Nov. 3, 1893, 28 St. L. 7.) Some act or thing which the law declares to be grounds for deportation must in this case be proven by the inspectors against the alien and that, we contend, was not done. Consequently the hearing was unfair as a matter of law.

"This certificate (Section Six, student's certificate) is the method which the two countries contracted in the treaty should establish a right to admission * * * and certainly it ought to be entitled to some weight in determining the rights of the one thus admitted. While this certificate may be overcome by proper evidence, and may not have the effect of a judicial determination, yet, being made in conformity to the treaty and upon it the Chinaman having been duly admitted to a residence in this country, he cannot be deported as in this case, because of wrongfully entering the United States upon a fraudulent certificate. In this record we can find no competent testimony which would overcome such legal effect of the

certificate, and the plaintiff in error was therefore wrongfully ordered to be deported."

Li Hop Fong v. U. S., 52 L. Ed. 888, 209 U. S. 453.

The only features of the record that offer even a hint that appellant might have entered this country from Mexico, or any other place, consist of the two statements appearing at pages 45 and 46 of the transcript, made by two Mexicans, G. Breton and Belisaro Garcia, on March 28, 1914, long before the date of the hearing. They are to the effect that Breton and Garcia had at certain times seen in Agua Prieta, Mexico, some Chinaman, a picture of whom marked "Bun Chew" was shown them. These statements are not sworn to but are accompanied by certificates [Tr. pp. 10-11] of an immigration officer stationed at Douglas, Arizona, which say nothing more than that the Mexicans made their respective statements before him and that one of them was interpreted from Spanish into English.

There is absolutely nothing in the record that connects, or purports to connect the photograph, "marked Bun Chew on the back thereof," with the appellant, that is, nothing outside of the name itself, and the presumption of identity of person from identity of name is hardly a proper one in the case of Chinese, who by reason of their unique system of nomenclature have numerous namesakes. (*In re* Bun Chew, 220 Fed. 387.)

There is nothing to show that the Chinaman, recog-

nized as having been in Agua Prieta, had the name in question. The photograph shown bore that name upon its back, but who put it there, and what the cognomen of the man whose portrait was so exhibited was, is left to conjecture. A photograph of Yuan Shi Kai, the present "president-emperor" of China, marked Bun Chew on the back thereof could be shown to a resident of Pekin, and his statement that he had seen such a person at the capital of China, could as well be used here as proof that the appellant had visited the country of his nativity, as can the statements in the record be fairly used in this case.

The certificates of the inspector at Douglas do not prove that the person seen in Agua Prieta had the name of Bun Chew, or that he was the appellant, for there is absolutely nothing in them to show that Mr. Heath knew either of the Chinamen by sight or by reputation. He says that he is the person before whom the Mexicans made their statements "concerning one Bun Chew" but his words on their face are based on no information and are nothing more than a conclusion.

The photograph attached to the certificate was never identified and the Secretary of Labor had no knowledge of the extent of its resemblance to the petitioner, or if it resembled him at all.

> "If the method of examination of the immigrant by the inspector was unfair, then the hearing before the Commissioner and Secretary were also unfair, since they were based upon that examination."
>
> U. S. v. Ruiz, 203 Fed. 443.

B. There Is No Evidence to Support the Charge That the Alien Entered the United States Without Inspection.

Granting *arguendo* that the appellant was seen in Mexico and that consequently he must have entered the United States subsequently, there is no evidence that he entered *without inspection.* It was so charged in his warrant of arrest and found in the order of deportation [Tr. pp. 32-33-34-63], but of proof of that fact that is not one jot, although the records at the few border ports of entry could easily have been examined and the question answered beyond doubt by simple letters from the inspectors in charge at said ports. That being a material part of the charge on which the order of deportation is made, there must be some evidence to prove such allegation, or the whole proceeding must fall on account of unfairness and lack of jurisdiction.

C. Improper Matter Was Used as Grounds for Deportation.

Another reason why the statements in question should be disregarded is that they were taken long before the time set for the hearing of the charges against the alien. They, as well as the statements of Dong Bow, Do Wye and Chun John [Tr. pp. 48-53], constituted the grounds for the *arrest* of Bun Chew but are not properly a part of the record to be used to order *deportation.* The statements were made in March, 1914 [Tr. pp. 45-51], while the warrant of arrest did not issue until May 22, 1914, and the hearing was not begun until that day.

A case very much in point is Whitfield v. Hanges, 222 Fed. 751 (C. C. A.), wherein the only matters that tended to show a violation of the Immigration Act were statements taken before the inspector, prior to the time set for the hearing of the charges. The Circuit Court of Appeals, Eighth Circuit, discussed the value of such matter in the record thoroughly and we respectfully refer this court to that opinion in its entirety.

Portions of this opinion read:

> "During the hearing the inspector permitted counsel for the appellees to read the statements he and police officers had drawn from the prostitutes before the arrest was made, but neither he nor the government offered or *introduced these statements in evidence.*
>
> "The information gathered under Sec. 12 (referring to acts of the commerce commission under the Commerce Act), like the information gathered by the inspector before the arrest, may be used as a basis for instituting prosecutions for violations of the law and for many other purposes, but it is not available as such in cases where a party is entitled to a hearing."

In the recently decided case of McDonald v. Siu Tak Sam, 225 Fed. 710, the Circuit Court of Appeals for the Eighth Circuit reaffirms the principles announced in Whitfield v. Hanges, *supra,* and discharges the Chinese from custody on the ground that he was not given a fair hearing. The attention of the court is respectfully invited to pages 712-713 (225 Fed.) of

that decision, as being particularly pertinent to the discussion of the case at bar.

In Choy Gum v. Backus, 223 Fed. 492, this court used language that might be construed as taking a different view from that expressed in Whitfield v. Hanges, *supra,* but the words are not so conclusive as to forbid us to raise the point, for in that case the mere propriety of including in the record *forwarded to the Secretary* evidence adduced prior to the hearing was passed upon. It was not held that deportation could be ordered solely on such evidence and we do not believe that such a rule would be promulgated by this court. If it were, its effect would be that by reason of his arrest an alien would have the burden of proof of his right to be in this country cast upon him and the department would be bound to offer no evidence at all, a situation which was clearly never intended by Congress to exist under the Immigration Act. Such a reversal of the ordinary rule of legal procedure could only exist by reason of a clear and explicit statement to that effect—such as is contained in the Chinese Exclusion Act in cases where a laborer is found without a certificate.

There is nothing in the record that could have shown the Secretary of Labor that the statement of Breton [Tr. p. 46] was ever read or translated (as Bun Chew spoke no English) to him. On pages 15 to 17 of the transcript it appears that the examining officer read various statements, purporting to have been made on previous dates, but the name of Breton is conspicuously absent, and, furthermore, none of the statements

so read were ever identified as being those appended to the application for the warrant of arrest. *Nor were any of them offered in evidence during the hearing.*

The inclusion of matter (for deportation), with which the alien has not been confronted, in the record sent to the Secretary is clearly legal unfairness.

> "In the present case if the letter be regarded as evidence used upon the hearing of the charge specified in the warrant, then such hearing was in law an unfair one, because the petitioner was never confronted with it and had no opportunity to controvert the statements which were made therein."
>
> *Ex parte* Sati, 215 Fed. 173 (N. Dist. Cal.).

> "Fair hearing of the alien's right to enter the United States means a hearing before the immigration officers in accordance with the fundamental principles that inhere in due process of law, and implies that the alien shall not only have a fair opportunity to present evidence in his favor, but shall be apprised of the evidence against him, so that at the conclusion of the hearing he may be in a position to know all of the evidence on which the matter is to be decided; it being not enough that the immigration officers meant to be fair."
>
> *Ex parte* Petkos, 212 Fed. 275.

In the Sati case, *supra,* it was further held that the alien is under no duty to search the records when informed that "he may now see all the matter on which the Secretary acted in issuing the warrant of the arrest."

It is immaterial in one view, whether or not, as a matter of fact, all of these statements were shown the

alien and he was given an unlimited opportunity to examine and answer them, for the Secretary's power to act depends entirely upon the record before him. If it did not appear from the record that the statements were shown Bun Chew, the hearing would be unfair in the eyes of the Secretary properly viewed, and the issuance of the warrant was then an abuse of discretion.

Before the publication of the opinion of this court in the case of Healy v. Backus, 221 Fed. 358, our view of the law led us to believe that, although hearings before executive officers were properly summary and informal, deportation could only be ordered upon a record containing evidence within the usual legal acceptation of the word and that *ex parte* statements were not admissible as means of proof. This court has declared the law to be otherwise, however, on the facts presented in that case and now, contrary to our intention at the time this appeal was taken, we must confine our argument to the point that the rule laid down in Healy v. Backus should not justify the deportation of Bun Chew upon the record in this case, even though his hearing might be considered fair and the statements of Breton and Garcia sufficiently explicit to show that he had been in Mexico and had entered the United States contrary to law.

District Judge Wolverton, writing the opinion of this court in the case of Choy Gum v. Backus, 223 Fed. 487, says:

> "In that case (Healy v. Backus) * * * a very wide range of inquiry was indulged in by

> which information was gathered by means of letters and reports, and yet the court was of the view that the inquiry was fairly conducted * * * and without abuse of discretion on the part of the immigration inspectors, and consequently refused to admit (the aliens) upon *habeas corpus; there being pertinent testimony adduced* from which the finding could be reasonably inferred."

This interpretation is a fair and correct one. There must be some *pertinent testimony,* or other legal evidence, before the officers and it can be supplemented and corroborated in ways not permitted in the courts, that is, the alien cannot be deported, as aimed to be done in this case, solely on hearsay or *ex parte* and unconnected statements. There must be some facts before the Secretary.

This view of the law is consistent with all the authorities, wherein matter, not legal evidence, was considered proper means of proof. In Healy v. Backus, *supra,* and in the cases cited in that opinion, the question involved was the prospect of the aliens becoming public charges and the board had some actual proof of that fact before it. As stated in United States v. Uhl, 215 Fed. 573, and quoted by this court in 221 Fed. at 365, the board

> "*knew* that the aliens were unable to speak any language known in this country and that only one could read or write."

It must be remembered also that the case at bar is a *deportation* case and not one of *exclusion.* In the latter class of cases hearings are had before certain boards, which themselves order admittance or exclu-

sion of the aliens before them on the evidence before them, while the Secretary deports only on a *report* given him. Therefore, it is more important that the proof submitted to him be real proof, for he has no opportunity of himself judging the appearance of the witnesses or the aliens or of learning intimately the local circumstances.

Moreover the very presence in the record of these two statements betrays unfairness on the part of the inspector and a desire to find some peg on which to hang an order of deportation, in spite of any proof the Chinaman might offer. They were unverified, when they could easily have been sworn to, had the officer desired to require the Mexicans to consider the seriousness of identifying under oath from a photograph a Chinaman, whom admittedly they had not seen for years and then only casually.

Even under the departmental definition of a "fair hearing" these statements should at least have been in the form of affidavits, for subdivision b of rule 35, Rules Relating to Deportation, issued by the Bureau of Immigration, Ed. 13, May 4, 1911, in speaking of an officer's application for a warrant of arrest, says:

> "A full statement must be made in every such application of the facts, *supported if practicable by affidavits*, which show the presence in the United States of the alien whose arrest and deportation is sought to be in violation of law."

We realize that the court will not reconsider the weight of the evidence offered before the inspector, but

we further realize that the rule of law that prevents doing so is based on the provisions of a statute and not upon the logic or the sense of justice of the courts. We are not bold enough to ask that the rule be disregarded, but we are frank in saying that the court should welcome any ground which would justify its release of an alien ordered deported on the strength of the *ex parte* statements used here—statements which on their face are indefinite, uncertain, unconnected and untrustworthy and which are made by men who had no sense of the importance of the act done. If Belisario Garcia for example had realized that he was being instrumental in severing the long established and close ties to this country, which the appellant has by reason of his residence here for almost a lifetime, it is doubtful if he would have troubled himself to inform us that the Chinese of Agua Prieta are so prosperous that "they now have a wagon of their own."

The Secretary of Labor has No Jurisdiction to Cause the Deportation of Appellant and has Acted in Excess of his Jurisdiction in Issuing the Warrant of Deportation.

The authority granted the Department of Labor to deport an alien on the charge embraced in the present warrant, is strictly limited by statute to a period of three years after entry. Sec. 21 of the Immigration Act of 1907, upon which said warrant is based, is explicit in its terms, as it reads:

> "That in case the Secretary of Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that the alien is

> subject to deportation * * *, he shall cause such alien *within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came.*"

The warrant of deportation [Tr. p. 8], although not evidence *and not founded on evidence,* states that the alien came into the United States "on or about" April 1, 1912. The petition for a writ of *habeas corpus* was filed April 13, 1915 [Tr. p. 54], or three years and thirteen days later than the last mentioned date.

It is apparent that the immigration officers acted on the belief that the deportation could be made after the expiration of the three years, if the warrant therefor was issued within that time, for the date of the alleged entry was mysteriously found by the secretary—from absolutely no evidence *and in spite of the fact that the findings at the warrant hearing* [*Tr. p.* 33] *give January 1, 1912, as the date of entry*—to be just four days less than three years from the date of the warrant. Such a belief, however, is not supported by the authorities on the subject, nor by a close reading of the statute. Both the order and the actual deportation must be made within three years.

The Circuit Court of Appeal, second circuit, discusses this point in the case of International Mercantile Co. v. the United States, 192 Fed. 887, in a thoroughly comprehensive manner. That case was one brought by the government to recover from a steamship company the cost of deporting certain aliens who had unlawfully landed from one of the defendant's vessels more than three years prior to their presenta-

tion for deportation and the refusal to accept them by the company. Although the action was brought under Sec. 20 of the Immigration Act of Feb. 20, 1907, it and Sec. 21 were construed together, as their wording is practically identical on the question of time.

The court cited the two sections and said in part:

> "Congress has said as clearly as the English language can express it, that an alien must be taken into custody *and deported;* that is, taken out of the country, *within three years.* If three years be an insufficient time in which to deport, the argument for additional time should be addressed to Congress and that body may enlarge the time as it has twice done already, increasing it from one year to two years and again to three years. If the words 'within a reasonable time' be read into the law, it will be a question of fact in every case, whether the secretary has had reasonable time—and thus a statute intended to be definite and certain will become so indefinite and uncertain that no workable rule can be deduced from its provisions."

The same court in U. S. v. Oceanic S. S. Co., 211 Fed. 967, in speaking of the same sections of the act, stated:

> "Little need be added to our opinion in International Mercantile Marine Co. v. U. S. The language of the statute is perfectly clear. The deportation may be made at any time within three years after the alien's entry into the United States. Such a statute cannot be enlarged by judicial interpretation; there is no room for construction. It cannot be twisted, turned, lengthened or shortened to meet the exigencies of each particular

case. If it is to be effective, all interested persons are to understand that it means what it says. A law of this character must be uniform and precise.

"If exceptions are to be made to the three years period of limitation, Congress should make them and not the courts."

In Healy v. Backus, 221 Fed. 358, this court in construing a similar section of the statute, said:

"But if entry has been made and the aliens have become public charges * * *, they may be deported *within three years after entry."*

Examining the record it appears that the entry, if made at all, must have been made more than three years before the date of the warrant of deportation. As stated before herein, there is no express evidence of when or where the alien entered the United States (if at all) within the last fifteen years. The only things in the record from which the entry and the date thereof could be inferred are the statements "of two more or less distinguished citizens of the Republic of Mexico" —to quote the words of Judge Bledsoe in *ex parte* Bun Chew, 220 Fed. 387 * * *, to-wit, G. Breton and Belisaro Garcia [Tr. pp. 45 and 46]. Breton says "to the best of my recollection it has been about two years since I saw this Chinaman the last time;" Garcia says that he saw such a person in Mexico "for about two years and until about three years ago."

Breton (whose statement, as above shown, was never exhibited to appellant) does not say that the last time he saw the Chinaman it was in Mexico and so, going back from the date of Garcia's statement (March 28,

1914), for a period of about three years, it is apparent that the appellant could not have been seen, if ever, in Mexico since March of 1911. Hence, the detention of the appellant was unlawful at the date of his arrest [May 22, 1914, Tr. p. 59] and at the time he sued out the writ of *habeas corpus* (April 13, 1915), and he should have been discharged, the Secretary of Labor having no jurisdiction and having lost all power in the premises by lapse of time.

The forum of the Department of Labor is obviously one of limited jurisdiction, its powers of action being confined to a period of three years after entry, and consequently, in accordance with the rule so often laid down by the federal courts, the facts conferring jurisdiction must be affirmatively proven in the face of the record; that is, an entry within three years must be proven and not left to the guess or conjecture of the Secretary or any of his subordinates.

The forum of the Postmaster-General, wherein he issues fraud orders against certain persons using the mails, is similar to that of the Secretary of Labor, wherein he issues deportation orders against certain aliens, and it has been said by the Supreme Court in the following clear and pertinent language:

> "Here it is contended that the Postmaster-General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters or to refuse to permit their delivery to person addressed, must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them. Conceding

arguendo that when a question of fact arises which if found in one way would show a violation of the statutes in question in some particular, the decision of the Postmaster-General that such violation had occurred would be conclusive and final and not the subject of review by any court, yet to that assumption must be added the statement that, if the evidence before the postmaster-general *in any view of the facts,* failed to show a violation of any federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because the facts, being conceded, whether they amounted to a violation of the statutes, would be a pure question of law and not a question of fact. Being a question of law simply and the case stated in the bill being outside of the statutes, the result is simply that the Postmaster-General has ordered the retention of letters directed to the complainants in a case not authorized by those statutes. *To authorize the interference of the Postmaster-General, the facts stated must in some aspect be sufficient to permit him under the statutes to make the order."*

School of Healing v. McAnnulty, 47 L. Ed. 90.

"The laws and principles upon which our government rests forbid the exercise of arbitrary power. Immigration officers must act within the powers given."

Ex parte Gregory, 210 Fed. 683.

The Supreme Court eloquently says, in Yick Wo v. Hopkins, 118 U. S. 226,

"that this is a government of laws, and not of men. And the law is the definition and limitation

of power. * * * For the very idea that one man may be compelled to hold his life, or the means of living, *or any material right* essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails."

The Secretary Exceeded his Jurisdiction in Ordering Deportation to the Country of Nativity and Not to that of Last Domicile.

By finding that Bun Chew should be deported, the Secretary must have disbelieved all the evidence offered by the appellant and have held only the statements of Breton and Garcia [Tr. pp. 45-46] worthy of credence. If so, he must have believed, as these men stated, that Bun Chew was for about three years a resident of Agua Prieta, Mexico, and engaged in the restaurant business at that place, owning property and being an active member of the business and social community. Such being the case, according to the Department's conclusion, the alien should lawfully have been deported to Mexico, as "the country from whence he came," and not to China.

The place to which deportation is to be made is governed by sections 20, 21 and 35 of the Immigration Act of 1907. The first two provide for deportation to "the country whence he came," which in this case would clearly be Mexico. The last above named section provides:

> "That the deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the trans-Pacific or trans-Atlantic ports, from

which said aliens *embarked for the United States,* or if such embarkation was from foreign contiguous territory, to the foreign port at which such aliens *embarked for such territory.*"

Nowhere in the record is there any attempt to prove an embarkation from a foreign port.

Amidon, district judge, in *ex parte* Gytl, ~~220~~ 240 Fed. 918, discusses the proper place to which deportation should be made as follows:

"In the great majority of cases the alien comes directly from the country of his nativity, and in case of deportation should be returned there. The Department, as the cases show, has been zealous to make this a universal rule. *That would simplify matters.* But like most universal rules, it will work cruel hardships in individual cases. The general rule under the statute is clearly that the alien shall be deported to the *country whence he came.* This is of course not necessarily the country of his nativity or citizenship. Sec. 35 gives a specific definition of the words 'whence he came' *in certain cases.* The first clause of that section deals with the aliens who embark directly for some port of the United States. The second clause applies to aliens who embark for the United States but land at contiguous territory.

"These aliens have kindred and friends in Manitoba; part of them have resided there for a year and six months, and others for six months * * *. To do that (deport them to Austria) would impose upon them a punishment such as civilized countries have heretofore afflicted only for the gravest offenses.

"In my judgment the phrase 'the country whence he came,' as used in the Immigration Act, when sections 20, 21 and 35 are construed together, means the country in which the alien *last had his domicile* prior to his unlawful entry into the United States."

In United States v. Redfern, 186 Fed. 604, it is said:

"The immigration laws clearly contemplate the deportation of aliens to the country whence they came, when they illegally entered, *regardless of nativity*. The only exception is when an alien, intending to enter the United States, for the convenience of voyage lands first in foreign territory contiguous to the United States. I do not find that the Secretary of Commerce and Labor has any discretion whatever in the matter, *and any warrant that attempts to exercise such discretion is necessarily illegal and void.*"

And in a case of a similar name, United States v. Redfern, 210 Fed. 548, the court found:

"From the return itself, it is evident that the warrant is irregular in that the Assistant Secretary of Labor found that the aliens entered the United States from Canada, yet they are deported to China. *This he is without authority to do.*"

It is true that there are individual cases in the books, notably that of Frick v. Lewis (Supreme Court), 58 L. Ed. 967, that appear to lay down the rule that deportation should be made to the country of the alien's nativity, but it will be noted that in all such cases the alien had entered from some other country wherein he had never established himself and had remained but a

very short time. In the Frick case, *supra,* for example, the alien had never established a domicile in Canada, *having in fact remained there but a few minutes.* Such cases do not bear upon the issues herein, as is pointed out in *ex parte* Gyti, quoted above.

If it is true that Bun Chew had three years' residence and business in Mexico, that country was his last place of domicile. We deny that he was ever in Mexico, but our position is that the warrant of deportation is void and illegal and that on the record the Secretary had no authority in law to issue it, directing deportation to China.

> "Domicile may be defined as home; a place where a person lives; his only place of residence."
>
> Young v. State, 104 N. W. 808 (Neb.).

> "Domicile in its general and popular sense denotes residence and should be treated as synonimous therewith."
>
> Ry. Co. v. McKnight, 99 Tex. 289;
> McDonnell v. Shoe Co., 115 S. W. 1028 (Mo.);
> Myrick v Myrick, 145 S. W. 146 (Mo.);
> Hoslop v. Trafe, 125 N. Y. Supp. 615;
> Kelley v. Supervisors, 42 Wis. 107.

In United States v. Ruiz, 203 Fed. 441, the Circuit Court of Appeals for the Fifth Circuit held that a native of Spain should be properly deported to Panama, of which country he was a citizen, affirming a decision of the district court, holding

> "that the immigration laws contemplated the deportation of an alien who had illegally entered the country to the *country whence he came,* when

> he illegally entered the country, *regardless of the country of his nativity,* and released the relator, because the warrant of deportation ordered him returned to Spain, *the country found by the department* to be that of his nativity and citizenship, instead of to Panama, from which country he came to the United States after having been *domiciled* there for a period of many years."

Had Congress intended deportation of contraband aliens to the land of their nativity, how easy and simple it would have been to have so said. The directness and simplicity of determining the now sometimes perplexing question of the proper country of deportation by merely asking, "Where were you *born?*" is at once apparent. In that event the law would direct deportation "to the country of his nativity," and not (as it now exists) "to the country whence he came."

It may be argued that the appellant should be deported to China because he did not claim the right to be deported to Mexico and himself demand that he be so deported. Such contention seems to us unreasonable and unjust. The Immigration Act does not contemplate that the alien shall have any voice in the selection of the country of deportation. The law prescribes exactly the duty of the Secretary to deport to the "country whence he came." The courts have construed that clause to mean the "country of the alien's last domicile." If the Secretary orders deportation inconsistent with the said law, as so construed, he exceeds his jurisdiction and his act is void. The Secretary's acts must be clearly within the law, regardless of the claims of the alien.

Appellant does not claim a right to be deported to Mexico and does not request to be so deported. Indeed, he wishes not to be deported to Mexico; but to what avail are his claims or wishes when a stern legal question is all that is before us? He claims only that the warrant of deportation is void, because the Secretary in issuing it and restraining him thereon, exceeded his legal powers and abused his discretion by illegally ordering deportation to the wrong country under the record before the Department.

In United States v. Redfern, 210 Fed. 550, the court discharged Chinese aliens in a case similar to this, because the Secretary ordered them deported to China instead of Canada, from whence, as the record showed, they came. The court said:

> "Congress has indeed vested the immigration officers with enormous powers, subject to no check save their own conscience, but in granting them discretion to arrest and deport any person charged with being an alien and unlawfully in the country, I cannot believe that it was ever intended that they could do so arbitrarily and *without some evidence upon which to base their decisions.*"

Where is the evidence that appellant came from China *via* Mexico to the United States? Can he be deported to China without evidence that he came from that country within the last three or four years?

In conclusion we adopt the language of the court in the *habeas corpus* case (wherein the Chinese was discharged), entitled *in re* Tam Chung, 223 Fed. 802:

> "Congress had vested him (the Secretary) with vast power, judicial in its nature, capable of infinite abuse and tyranny, little restrained by the Constitution, procedure, publicity, responsibilities and traditions that hedge about a court, and little controlled, save by his honor and conscience; *but it has its limits,* and they have been exceeded here."

It is respectfully submitted that the judgment be reversed and appellant discharged.

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J. W. HOWELL,
On the Brief.